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1917

JAMES D. BAHER,
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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 769.

MEYER GRAUBARD,

Plaintiff-in-Error,

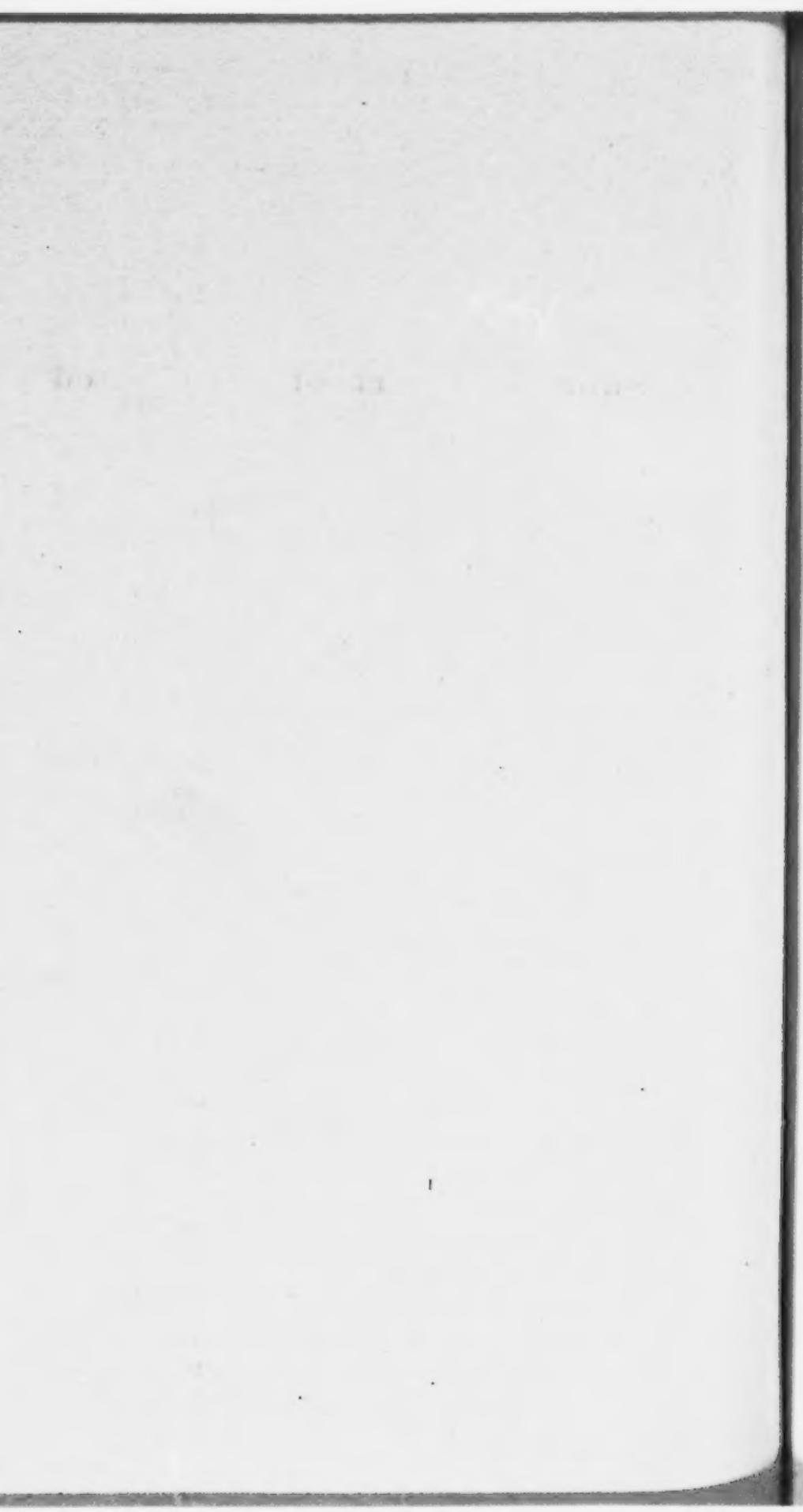
against

UNITED STATES OF AMERICA,

Defendant-in-Error.

Brief for Plaintiff-in-Error.

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*Edwin T. Taliaferro,
In Argument.*

Supreme Court of the United States

MEYER GRAUBARD,
Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

The Case.

This is an appeal from a verdict of conviction, and judgment thereon, rendered in the United States District Court for the Southern District of New York, on the 30th day of July, 1917.

The plaintiff-in-error was indicted in that court for a violation of the Act of Congress approved May 18th, 1917, entitled, "An Act to authorize the President to increase temporarily the military establishment of the United States." He pleaded not guilty to the indictment, and upon the trial before a jury was convicted, and this is an appeal to this Court from the judgment of conviction.

After such conviction the plaintiff-in-error presented to one of the Justices of this Court a petition for a writ of error, which, on the 31st day of August, 1917, was granted and a citation duly issued.

The questions submitted to this Court upon the appeal, therefore, are contained in the assignment of errors set forth in the record, and in substance present the constitutionality of the said Act of Congress.

POINT I.

No power is expressly granted by the Constitution of the United States, to Congress, to pass a Selective Draft Act or other conscription or forcible service Act. Such an Act is in violation of the Constitution of the United States and of the sovereign right of the citizen.

A conscription, or forcible military service act, is fundamentally wrong and without Constitutional authority. Such was not contemplated by the Constitution of the United States when adopted in 1789, and no amendment to the Constitution since that time grants such a power to Congress.

At the time of the adoption of the Constitution, there was not then in force in any country in Europe, nor in any civilized country in the world, nor in the United States, any law with one exception, authorizing conscription or forcible service in the army.

In an opinion delivered by Mr. Justice Rogers in the District Court of the United States for the Southern District of New York in the case of *John Ingles vs. John Sullivan and others*, reported in N. Y. Law Journal of Oct. 25, 1917, he makes the following statement, viz:

"At the time the Constitution was adopted, conscription was not an unknown mode of raising armies, but had been resorted to by governments throughout the world."

It is true that at that time an act had been passed in May, 1777, by the General Assembly of Virginia, providing for forcible conscription, and that said act was drafted by Thomas Jefferson.

But this was a state conscription law and not a national one.

So that, as we are informed, no government in Europe at the time of the adoption of the Constitution of the United States exercised or had the right to exercise, with one exception, the power of forcible conscription.

At that time such a power was not expressed in the general power of any government to raise an army, or to do other acts for the general welfare of the country, with the one exception mentioned.

In 1704, and again in 1707, conscription bills were introduced in the Parliament of England, and after full discussion and consideration, were laid aside as unconstitutional. See Opinion of Mr. Justice Woodward in the case of *Kneedler et al. vs. Lane et al.*, 45th Pa., 255.

At that time, of course, as it is today, England had no written Constitution, as we have in this country, defining definitely the powers of the law-making branch of the government. It was, perhaps, largely due to this historical fact that Mr. Justice Woodward reached his conclusion in the above case, and in which he uses the following language:

"I raise my objections to its constitutionality upon these grounds:

"1st. That the power of Congress to raise and support armies does not include the power to draft the Militia of the states.

"2nd. That the power of Congress to call forth the Militia cannot be exercised in the form of this enactment.

"3rd. That a citizen cannot be subjected to the rules and articles of war until he is in actual military service.

"4th. That he is not placed in such actual service when his name has been drawn from a wheel and notice thereof has been served upon him."

Kneedler et al. vs. Lane et al., 45th Pa., 255.

In 1792 the Royalist Military forces of France, being greatly depleted and at a very low ebb, it was proposed to pass a law authorizing forcible conscription. However, the Constituent Assembly, being the law-making power of France at that time, rejected the proposition upon the sole ground that "compulsory service was at variance with the liberty of the citizens."

Enc. Britannica, Vol. 2, page 505.

In 1798, however, under the iron heel of Napoleon, the law-making power of France adopted a Conscription Act and other sovereignties and governments of Europe almost immediately followed the example.

This, however, was long after the adoption of the Constitution of the United States.

It will be observed also that it was not claimed that the State or Colony of Virginia had the inherent power to conscript. It required an Act of Assembly to do so. Besides that, the act only proposed to conscript for militia purposes.

About the year 1670, Ernest Augustus, Duke of Hanover, the father of King George the First of England, made it a business to sell or rent his soldiers to other sovereigns to fight their battles in foreign countries. It is related by Mr. Thackeray in his lec-

tures on the Four Georges, that at one time Ernest Augustus "sold" to the Doge of Venice, 5,400 soldiers to fight his battles, and that of this number only 1,400 ever returned home. This wholesale sale of soldiers was excused upon the ground that the revenue derived therefrom was necessary for the support of the Duke's kingdom, and therefore could properly come under the general welfare powers of the sovereign power. Other sovereigns in Europe and in Prussia did the same thing, notably the Duke of Saxony and the Duke of Zelle. *This was forcible military service.*

Of course, in the above cases, soldiers were not fighting in the defense of their own country, nor to resist invasion, whereas, enlistments under our Conscription Act are for purposes deemed necessary to the maintenance and dignity of our Government.

Nevertheless, it is fair to assume that the Hanoverians fought against their will and fought in a foreign country; and if the plaintiff-in-error's conviction should stand and he is forced to the front in a foreign country, he would be fighting against his will and in a foreign country.

The action of Duke Ernest Augustus and other sovereigns of Prussia in selling their troops and sacrificing so many lives of soldiers, resulted in such a tragic disaster and wholesale slaughter of human beings, that the whole of Europe revolted against such forcible military service.

In this enlightened 20th century, our own people are in full accord with the principle that "an avoidable war is a public crime."

It was, perhaps, largely due to this fact that the English Parliament in 1704, and again in 1707, refused to pass a forcible conscription bill, because the same was unconstitutional. Perhaps, also, another result was the refusal of the Constituent Assembly of France, in 1792, to pass such a bill. So that, instead

of conscription laws and a conscription system being in force in any civilized country in Europe at the time of the adoption of the Constitution, the opposite with one exception, seems to be true. If, on the contrary, the policy of other civilized governments of the world was to raise armies entirely and solely by volunteer service; and if other civilized governments had expressly refused to pass conscription acts because they were unconstitutional or violative of the rights of the citizen, then we submit that a fair construction of the meaning of the words "to raise an army" would only include the right to raise an army by voluntary service.

It is a significant fact that the Constitution originally consisting of Seven Articles and subsequently of Seventeen Amendments, nowhere confers upon Congress the power to pass, or the President to enforce, a forcible draft or conscription act. It can well be understood that the monarchs of Europe have exercised and claimed powers over their armies, and over their subjects, which were never claimed by the Government of the United States, and which powers were expressly repudiated by the Constitution.

In free America every citizen is a sovereign and no soldier is a serf.

One of the best considered cases on the right of conscription that has come before any of the courts in this country is the case of *Knedler et al. vs. Lane et al.*, *supra*. In that case the Court by a majority of one held a conscription act to be unconstitutional. Afterwards one of the Judges then presiding retired and another was elected to fill his place. His successor held different views from the retiring Judge, and the decision of the Court was therefore changed and reversed. This decision was rendered in 1863, and must have challenged the attention of the entire coun-

try, especially of members of Congress and of the United States Senate.

Other amendments have been adopted since that time, and still with the full knowledge of the importance of the subject, no amendment has been proposed authorizing Congress to pass a conscription act. More than this, the highest Court of Appeals of a number of states, during the War of the Rebellion, passed upon the constitutionality of conscription acts, and nearly all, or quite all of them held such acts to be unconstitutional. Thus emphasizing the importance of an amendment.

It will be noted, however, upon an examination of these decisions, that most of them were decided upon the proposition that a conscription act was constitutional as applied to the militia raising power of the state, and some of these decisions are entirely silent upon the authority of Congress to do so. Of course, we are not to forget the fact that these decisions were rendered in the excitement of a fierce and bitter Civil War.

The following reported cases on the constitutionality of the conscription acts will be found in the books:

- Spangler*, 11th Mich., 298.
- Druecker vs. Solomon*, 21st Wis., 621.
- Allen vs. Colby*, 47th N. H., 544.
- Ex parte Copeland*, 26th Texas, 386.
- Jefferson vs. Fair*, 33rd Ga., 347.
- Barber vs. Irvin*, 34th Ga., 28.
- Ex parte Hill*, 38th Ala., 420.
- Ex parte Bolling*, 39th Ala., 609.
- Gatlin vs. Walton*, 60th N. C., 333.
- Burr vs. Paton*, 57th Va., 470.
- Kneedler vs. Lane*, 45th Pa., 238.

It is safe to assert, in view of the pronounced opposition in Congress and public sentiment among the people against a conscription bill, that if an amend-

ment to the Constitution had ever been proposed, authorizing conscription, the same would never have received the necessary approval.

There was one exception to the general policy of European sovereignties and governments in failing or refusing to adopt a conscript law.

During the American Revolution the Statute of 19th Geo. 3, Ch. 10, permitted the impressment of "idle and disorderly persons not following any lawful trade or having some substance sufficient for their subsistence," and this was as far as English legislation had gone when our Federal Constitution was adopted in 1789. Upon this act Mr. Justice Woodward in the case reported in 45th Pa., 255, makes the following pungent comment:

"Assuredly the framers of our Constitution did not intend to subject the people of the States to a system of conscription which was applied in the mother country only to paupers and vagabonds."

POINT II.

The Act of May 18th, 1917, is unconstitutional, because it authorizes the President of the United States to "raise an army" while this power is alone conferred on Congress.

Neither the contention for implied powers in the Constitution, nor the extension of the power of Congress under the General Welfare Clause to pass laws, can in any way affect the provisions, our contention providing that the President had no power under the Constitution to "raise an army."

The language of Article I, Section 12, of the Constitution is as follows:

"12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

In construing this clause of the Constitution we submit that the only question to be determined is *whether the Constitution says what it means and means what it says.* The Constitution expressly gives the power to "raise an army" to Congress and to *Congress alone.* It confers no power expressly or impliedly upon the President of the United States to "raise an army."

Section 13 of Article I of the Constitution reads as follows:

"13. To provide and maintain a navy."

Suppose the Act of May 18th had expressly authorized the President of the United States "to provide and maintain a navy." Would this Court have held that such an act was constitutional? There can be but one answer.

Then, if under the Constitution the President has no power to provide and maintain a navy, because by Article I of the Constitution that power is given alone to Congress, we submit for the very same reason that Congress had no authority to confer upon him the power to "raise an army."

It may be said that the raising of an army implies physical, executive and ministerial acts, such as Congress cannot perform, and such as may and must be delegated to some executive officer. Whether this be true or not, still the power to "raise an army" is conferred in express terms on Congress and not upon the President.

We see no reason why Congress could not pass laws, rules and regulations specifying of what an army shall

consist—how many companies, regiments, divisions and corps—the particular method of obtaining volunteer service, time of service, locality and period of enlistment and every detail in the way of regulations which the President himself could do. The President of the United States cannot physically and personally go into the different sections of the country and "raise an army" by enlistment or conscription. It must at least be done by other persons to be named by him, and Congress could have done identically the same thing just as the Constitution required.

The plain, common sense construction of the Act of Congress is unambiguous. Congress has simply said by this Act,

"It is true that the Constitution of the United States has clothed us with the power of 'raising an army.' It is also true that the Constitution has not clothed the President of the United States with the power to 'raise an army.' On the contrary the Constitution has withheld this power from the President and conferred it upon us and upon us alone. Notwithstanding this fact, we will arbitrarily by this Act clothe the President with the power to 'raise an army,' doing exactly what the Constitution has in effect said he could not do, and that we alone could do."

We submit that this proposition cannot be answered. In the case of

McCullough vs. Maryland, 4th Wheaton, 415.

Mr. Justice Marshall of this Court delivered an able and exhaustive opinion upon the implied powers of Congress. He went so far as to hold that Congress had the constitutional power to pass an Act organizing a banking corporation. The case is, perhaps, the leading one in all the books on the subject of the implied powers of Congress.

As before stated, however, the question of "implied powers" does not arise, where express terms are used, and where the necessity of invoking implied powers does not arise. For the same reason, the General Welfare Clause of the Constitution cannot be used as an argument on this proposition, because of the fact of the express language used by the Constitution.

It may be insisted that the power conferred by Congress upon the President was a power to *execute a law* passed by Congress and nothing more. In the opinion of Mr. Justice Rogers in the case of *John Anglus vs. John Sullivan, supra*, he announces this doctrine and cites in support of it the case of *Field vs. Clark*, 143rd U. S., 649.

In this case the majority of the Court held that the Act complained of was not unconstitutional.

Mr. Justice Lamar dissented, and Chief Justice Fuller concurred in the dissent. The decision, however, does recognize the general doctrine that Congress has no power to confer on the President the power to make a law, but has the power to clothe him with authority to execute a law.

We submit that this case and other cases deciding the same question, do not militate against our contention in this case. In other words, we submit that the power conferred is so express and unequivocal in its terms, that it does not admit of the application of the doctrine of "implied powers."

We submit further that it is wholly immaterial whether Congress can clothe the President with legislative power or with the power to execute a law, so far as this case is concerned. This is so because of the unequivocal language of the Constitution confining the power to "raise an army" alone upon Congress.

We submit further that if the Constitution were to clothe Congress with the power to do a physical act or to perform an executive act, Congress would then have the right under such a provision to do either, and no other co-ordinate branch of the Government would have such power.

What difference does it make whether the power conferred is to do an executive act or a legislative act? Even if it be true that Congress could not perform the executive act, it would by no means follow that the President would have the right to perform such executive act, because of the obvious fact that no such power was granted to him by the Constitution.

After all, we go back to the proposition what was meant by the words "raise an army" at the time of the adoption of the Constitution? We cite on this proposition an extract from *Black on Interpretation of Laws* 143. This authority lays down the rule as follows:

"The rule is that words and phrases implied in a Statute are to be read in their natural and ordinary sense according to good and approved usage, etc., etc."

In support of this proposition he cites a very large number of authorities, both Federal and State. They are as follows:

- 148 Federal Reporter, 771.
- 120th Ill. App., 70.
- 23rd Ind., 137.
- 94th Mo., 330.
- 128th App. Div. (N. Y.), 257.
- 108th Va., 245.
- 106th N. Y., 260.

and numerous other decisions.

So that it comes to the proposition of what was meant by "raising an army" at the time of the adoption of the Constitution. In order to determine what

was the proper construction of that language at that time, we must look to the use of the language by England, France and other civilized countries. Adopting this rule of construction, we submit that there was no civilized government in Europe or upon the face of the earth at that time, that construed the meaning of the words "raise an army" to include the power to conscript. In the case in *15th Pa., 255, supra*, Mr. Justice Woodward very properly uses the following language:

"On the contrary I infer that the power conferred on Congress was the power to raise armies by the ordinary English method of voluntary enlistment."

So that we wind up this point, as we began, with this statement, that if the Constitution means what it says, and says what it means, the Act of May 18th was in violation of that instrument, because it conferred upon the President the power to "raise an army" when such power was alone given to Congress.

POINT III.

The Act is unconstitutional because it clothes the President with the power of creating courts of justice.

Section 1 of Article III of the Constitution reads as follows:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

In Section 4 of the Act of May 18th, 1917, it is provided that the President "is hereby authorized in

his discretion to create and establish * * * local boards, etc., etc."

It is also provided in Section 4 of said Act that the President is authorized "to establish additional boards, one in each judicial district of the United States, consisting of such number of citizens not connected with the military establishment as the President may determine, who shall be appointed by the President. * * *

"Such district boards shall review on appeal and affirm, modify or reverse any decision of any local board etc., etc."

By the express terms of this Act the President of the United States is authorized to "create" a local board.

He is also authorized to establish additional boards known as "district boards" with the power to "review on appeal and affirm, modify or reverse any decision of the local boards."

We submit that if language means anything, the President under this Act becomes the creator and the original organizer of both the district boards and the local boards.

The inquiry then arises. Are these boards Courts in the sense that that term is used in the Constitution? This Court, of course, will take judicial notice of the rules and regulations provided for the organization of these boards and their methods of conducting business. Take for instance the City of New York. On the district board of that city are a number of distinguished and eminent lawyers.

Among them, Hon. Charles F. Hughes, once a member of this Court, and Hon. Edgar L. Cannon, formerly Chief Judge of the Court of Appeals of the State of New York. These judges, as members of the district board, and sitting in the same, act essentially as

judges of courts. They become a Court in every essential. They investigate, deliberate and decide both *questions of law and of fact*, and render sometimes lengthy and exhaustive written opinions on both the law and the facts at pending cases.

Hon. Charles F. Hughes, while a member of the Court, never performed more essentially the function of a judge in rendering a decision, than he does in rendering *some decisions* as a member of that district board.

We submit therefore, that these boards are Courts with all the functions and powers of Courts and with all the duties and jurisdiction of Courts, and that no distinction can be drawn between the functions of these district judges and the Appellate Courts of the country.

Therefore, of our position be what it may, the *Act* directly violates and contradicts the Constitution of the United States.

POINT IV.

The Act of May 18th, 1917, should be declared unconstitutional; the judgment of the lower courts should be reversed, and the defendant discharged.

Respectfully submitted,

J. H. McLean,
Attorney for Plaintiff in Error

Washington, D. C.
October 10, 1917.